IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Notice of Motion No. 3780 of 2006
and
Notice of Motion No. 3781 of 2006
in
Suit No.1305 of 1987

Smt.Arati Anil Sarwate and others ..Plaintiffs

vs.

Shashikant Pandurang Phadke
and others ..Respondents

Mr.Munshi i/b M/s DSK Legal for plaintiffs.
Mr.S.V.Sthalekar for defendant nos.1
Mr.S.V.Sadavarte for defendant no.2 and 3.

CORAM: S.C.DHARMADHIKARI J
10th October,2007

P.C.

1. These Notices of Motion are preferred by the plaintiffs in suit no.1305 of 1987 wherein the prayer in the first motion is to take action against defendant nos. 1 to 3 under Order 39 Rule 2A of the Code of Civil Procedure.

2. In the second motion request is that the order of status quo passed by this Court on 15th May, 1987, 8th April, 1988 and 13th December, 1991 be vacated.

3. The plaintiffs allege that the suit is filed by them for a declaration that the agreement for sale

dated 19th October, 1980 (Exh.B to the plaint) with Defendant nos.1 to 3 for sale of immovable property admeasuring 2513.49 sq.meters, more particularly described in plaint Exh.A to the plaint and the power of attorney executed on 31st October, 1980 have been validly terminated and that these defendants do not have any authority to create any rights in pursuance of the above documents.

4. It is alleged that in furtherance of the power of attorney and despite termination, defendant nos.1 to 3 have wrongfully obtained possession of a portion of the suit property admeasuring about 740 sq.meters. Hereinafter informed to as the said portion This has been done by execution of certain decrees and orders against some tenants on the property. The structures have been demolished.

5. The suit was filed on 7th April, 1987 and a order and decree has also been claimed to hand over to the original plaintiffs possession of this portion.

6. Consideration paid towards the agreement and the power of attorney are also set out. In this suit, Notice of Motion No.1175 of 1987 was moved and ad-interim order was passed on 15th May, 1987,

a copy of which is at Exh.A to the motion.

7. It also appears that defendant nos. 1 to 3 filed suit no.915 of 1988 for specific performance of the agreement referred to above.

8. The allegation is that one suit is filed in this Court being suit no.2900 of 2006 and that suit is filed by M/s Motiram Tolaram against not only the defendants to the above suit but against plaintiffs herein claiming specific performance of the agreement dated 5th September, 1987. In the Notice of Motion in the suit of M/s Motiram Tolaram, ad-interim order was passed by this Court on 7th October, 2006 restraining the present plaintiffs and defendants from selling and disposing of the portion referred to above.

9. It is alleged that during the course of hearing of the Notice of Motion and above suit, the plaintiffs became aware of the agreement dated 5th September, 1987 which has been entered into by the original defendant nos.1 to 3 with one Pritam Dayal Choudhari. The said Pritam Dayal Choudhari paid a sum of Rs.5,00,000 and it is alleged that he was agreed to be put in possession of the portion referred to above upon payment of Rs.2,00,000/-.

Thus, the allegation is that in the teeth of the order passed by this Court on 15th May, 1987 defendant nos. 1 to 3 could not have entered into the agreement with Pritam Dayal Choudhari.

10. It now appears that the said Pritam Dayal Choudhari agreed to assign his right in the same portion to M/s Motiram Tolaram and that is how the above suit by M/s Motiram Tolaram has been filed.

11. My attention is invited by Mr.Purandare and Mr.Munshi to the affidavit in support of the Notice of Motion setting out the above facts and particularly to para 6 thereof and it is contended that in the light of this clear position, I must proceed to take action under the above mentioned statutory provisions.

12. Affidavit in reply has been filed to which my attention has been invited by Mr.Sthalekar. Mr.Sthalekar submits that this Notice of Motion is not maintainable. It is contended by him that all allegations therein are false in as much as no case is made out under Order 39 Rule 2A of the Code of Civil Procedure. After setting out the position with regard to the original agreement and the suit which was filed by defendant nos.1 to 3, it is

contended that the story that the plaintiffs came to know of the agreement with Pritam Dayal Choudhari for the first time when proceedings in suit no.2900 of 2006 were pending is false to the knowledge of the plaintiffs. In any event, the status quo order has not been violated. It is contended that the defendants informed the said Pritam Dayal Choudhari about the pendency of the suit by the plaintiffs. The original plaintiffs had agreed to withdraw the suit and also to revoke the power of attorney. It is on this understanding between the parties that the agreement was entered into. In any event kin the circumstances thereafter, namely, further rights created by Pritam Dayal Choudhari shows that the plaintiffs are not acting bonafide and all these are pressurising tactics. There is no explanation for the delay in moving this Court.

13. Affidavit in reply is also filed on behalf of defendant nos. 2 and 3 by one Ganesh Kariappa Shetty. The said affidavit in filed on 10th August, 2007 and Mr.Sadavarte is appearing for these defendants. Mr.Sadavarte has invited my attention to the affidavit and has contended that although the suits are pending, but the order of this Court has not been violated. Further, it is

contended that the proceedings are hopelessly delayed and barred by limitation in as much as the original plaintiff died on 10th May, 2003. Till her death talks were going on and after her death present plaintiffs were brought on record. Due to failure of compromise talks, there was a delay in taking out the chamber summons in suit no.951 of 1988. The chamber summons was moved by defendant nos.2 and 3 themselves. My attention is invited to order dated 5th June, 2007, copy of which is annexed as Exhibit 1 to the affidavit in reply of defendant nos.2 and 3. My attention is also invited to the fact that some documents were also executed pursuant to the terms. It is submitted that rights have been assigned in favour of M/s Motiram Tolaram. It is pointed out that after filing of the suit no.2900 of 2006, ad-interim relief was obtained and immediately thereafter consent terms between the present plaintiffs and M/s Motiram Tolaram were filed. This conduct of the present plaintiffs demonstrates that they have no desire to bring to the notice of the Court any violation of the orders passed by this Court but are adopting pressurising tactics so that even these defendants give up their right, title and interest, if any, in the property.

14. These statements are sought to be denied in the rejoinder by plaintiff no.1A. While not disputing the statement that there is any collusion with M/s Motiram Tolaram, the talks of compromise and all events in that behalf are also denied.

15. I have heard the learned Counsel at some length. With their assistance I have perused the Notices of Motion and affidavits filed in support thereof. I have also been taken through the orders passed by this Court. Order XXXIX Rule 2A of the Code of Civil Procedure reads thus:

> "1.Cases in which temporary injunction may be granted:-----
>
> 2. Injunction to restrain repetition or continuance of breach.....
>
> 2A. Consequence of disobedience or breach of injunction: -(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or

proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the mean time the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

16. The Hon'ble Supreme Court in the matter of Samee Khan Vs. Bindu Khan reported in A.I.R.1998 Supreme Court, Page 2768 has spelt out the scope of these provisions. The Hon'ble Supreme Court has observed that the Court may either order property of the person guilty of disobedience or breach to be attached or may direct that such person be detained in civil prison. In paras 12, 13, 14 and 15 of this decision the Supreme Cosurt summerises

the legal position. Hence, it not as if detention must be directed. Ultimately, it is a punishment and the Court has discretion in that behalf. T

> "12.....Thus, even under Order 39, Rule 2A the attachment is a mode to compel the opposite party to obey the order of injunction. But detaining the disobedient party in civil prison is a mode of punishment for his being uilty of such disobedience."

> 13. The words and may also" appearing in R.2-A were sought to be given a meaning that the course suggested thereafter in the Rule has to be resorted to as an option step, a resort to which would be impermissible without complying with the first course suggested in the Rule. The word "also" has different attributes and its meaning is not to be confined to "further more". In legalistic use, the word "also" can be employed to denote other meansings as well. In Black’s Law Dictionary the word "also" has the following variety of meanings:

> . "Also. Besides; as well; in addition;

likewise; in like manner; similarly; too; withal. Some other thing; including; further; furthermore, in the same manner; moreover; nearly the same as the word "and" or "like wise".

14. Since the word "also" can have meanings as such "as well" or "likewise", can-not those meanigns be used for understanding the scope of the trio words "and may also?" Those words cannot altogether be detached from the other words in the sub-rule. Here again the word "and" need not necessarily be understood as denoting a conjunctive sense. In Stroud’s Judicial Dictionary it is stated that the word "and" has generally a cumulative sense, but some times it is by force of a context read as "or". Maxwell on "interpretation of Status" has recognised the asbove use to carry out the interpretation of the legislature. This has been approved by this Court in Ishwar Singh V.State of U.OP. A.I.R.1968 SC 1450. The principle of Noscitur A Sociis can profitably be used to construct the word "any may also" in the sub rule.

15. Hence the words "and may also" in Rule 2-A cannot be interpreted in the context as denoting to a step which is permissible only as additional to attachment of property of the opposite party. If those words are interpreted like that it may lead to an anomalous situation. If the person who defies the injunction order has no property at all the Court becomes totally powerless to deal with such a disobedient party. He would be immuned from all consequences even for any open defiance of a Court order. No interpretation shall be allowed to bring about such a sterile or anomalous situation (vide Constitution Bench inVidya Charan Shukla Vs. Khubchand Baghel, AIR 1964 (SC 1099. The pragmatic interpretation, therefore, must be this: it is open to the Court to attach the property of the disobeying party and at the same time the court can order him to be detained in civil prison also if the Court deems it necessary. Similarly the court which orders the person to be detained in civil prison can also attach the property of that person. Both steps can be resorted to or one of them

alone need be chosen. It is left to the Court to decide on consideration of the fact situation in each case."

17. A bare perusal of the provisions would indicate that it is the power of the Court and the Court may exercise the same upon being satisfied about the breach. In the instant case from the facts narrated in the affidavit, it is apparent that the plaintiffs were aware of the order of statusquo and agreement entered into with the said Mr.Pritam Dayal Choudhari. It is not as if they are innocent parties who genuinely feel that the proceedings instituted by them are frustrated and defeated. They themselves creat these state of affairs. They do not dispute that 740 sq.meters (said portion) was in possession of defendant nos.1 to 3 and the said possession was obtained by executing the decree against the tenants. Further, they were aware of alienation and attempts thereat by defendant nos.1 to 3. Not only that but they knew about the attempts to alienate the property further by Mr.Pritam Dayal Choudhari. The plaintiffs as well as defendants and the said Choudhari are parties to the suit filed by M/s Motiram Tolaram. There is substance in the contention that once the plaintiffs compromise the

suit with M/s Motiram Tolaram and no compromise could go through with other parties in other suits, that this Notice of Motion has been taken out. It is pertinent to note that orders of this Court are of 1987. The suit is filed much earlier. The present motion is taken out some time in November, 2006.

18. That apart, the plaintiffs are now seeking vacating the order of statusquo in as much as they are aware of the attempt at alienation of the said portion. If they were interested in bringing the defendants to book for their disobedience or breach of the order, they would not have prayed for the reliefs that are sought in Notice of Motion No.3781 of 2006. In the affidavit filed in support of the said Motion, this is what is stated in para 5.

> "5. It has now come to the knowledge of the plaintiffs (from the proceedings of Suit No.2900 of 2006 referred hereinafter) that after the aforestated ad-interim order of status quo was made by this Hon'ble Court on 15.5.1987 and in breach thereof, the Defendant Nos. 1 to 3 entered into an Agreement dated 5.9.1987 with one Pritam Dayal Chaudhari for sale of the portion of

the suit property in their possession for the price of Rs.27 lacs and also received on 5.9.1987 from the said Pritam Dayal Chaudhari a sum of Rs.5 lacs towards the said price. By further writing executed by the defendant nos.1 to 3 in favour of the said Pritam Dayal Chaudhari also on 5.9.1987, the said Defendant Nos. 1 to 3 also agreed to put the said Pritam Dayal Chaudhari in possession of the portion of the suit property being the subject matter of the suit against receiving from him a further amount of Rs.2 lacs and which portion was in their wrongful possession. By entering into this subsequent agreement, after passing of the said order dated 15.5.1987, the defendant nos.1 to 3 ex facie violated the said order of status quo made on 15.5.1987. In their said agreement dated 5.9.1987 with the said Pritam Dayal Choudhari the defendant nos.1 to 3 expressly recorded that the said defendants had so far (i.e. till 5.9.1987) paid to the original plaintiff a sum of Rs.1,20,000/- and balance payable to the original plaintiff under the said agreement dated 19.10.1980 was Rs.3,80,000/- This admission on their part

clearly falsify the subsequent statement of the defendant nos. 1 to 3 in their Affidavit in Reply dated 20.11.1987 filed before this Hon'ble Court that they had paid to the original plaintiff the amounts aggregating to Rs.2,96,000/- The Defendant Nos. 1 to 3 neither in their said Affidavit dated 20.11.1987 filed in reply to the Notice of Motion No.1175 of 1987 or in their plaint in Suit No.951 of 1988 filed on 8.3.1988 made any reference to the said Agreement for sale dated 5.9.1987 executed by them in favour of the said Pritam Dayal Choudhari nor they mentioned the fact that according to them they had paid to the original plaintiff only Rs.1,20,000/- and suppressed both the said facts from this Hon'ble Court by filing their said false Affidavit dated 20.11.1987 and later on their said false suit on 8.3.1988.l By suppression of the aforementioned facts from this Hon'ble Court by defendant nos.1 to 3 and on their contention that on 8.3.1988 they had also filed their said suit no.951 of 1988, the said defendants persuaded this Hon'ble Court to confirm the earlier ad-interim order of status quo as passed by

this Hon'ble Court on 15.5.1987. This Hon'ble Court thereupon by further interim order dated 8.4.1988 made by his Lordship Mr.Justice H.Suresh was persuaded to direct both the parties namely the original plaintiff and defendant nos. 1 to 3 to maintain status quo of the portion of the property in their respective possession and further requiring the original plaintiff not to create any third party rights in respect of the said portion of the property which was in her possession. At the time of passing of this order, the defendant nos.1 to 3 had suppressed from this Hon'ble Court the fact that after passing of the ad-interim order they had already created third party rights as aforementioned and thereby changed the status quo. I respectfully submit that had the said facts were disclosed by the defendant nos. 1 to 3 to the Hon'ble Court this Hon'ble Court would not have passed the said order on 8.4.1988 against the original plaintiff."

19. In para 7 the plaintiffs depose about the suit filed by M/s Motiram Tolaram and in para 9 after setting out all the facts they pray that in the

interest of justice all the orders should be vacated. Thus, partly the plaintiffs have also breached the order of status quo. They compromised the suit with M/s Motiram Tolaram knowing fully well that this party is a beneficiary of the breach of this Court's order.

20. In my view, because of enormous and inordinate delay so also on account of their conduct the plaintiffs have disentitled themselves from claiming any discretionary relief from this Court. This is not a matter where the Court should assist the plaintifs. The parties who have instituted the proceedings have not brought to the knowledge of the Court the disobedience or breach of this order although they seem to be aware of the same. In fact, the plaintiffs commenced negotiations and held compromise talks with persons who are parties to the breach and responsible for the same. In the light of the above, there is no substance in any of the motions and both the motions stand dismissed. No order as to costs. All the three suits be placed for directions for framing of issues after two weeks.

(S.C.DHARMADHIKARI J.)